2013 IL App (5th) 110513-U

NOS. 5-11-0513 and 5-11-0514 (consolidated)

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE BANK OF EDWARDSVILLE, Trustee of the Marian L. Beyer Trust Under Will of Emma W. Beyer, Plaintiff-Appellee, v. MARIAN BEYER, Defendant-Appellant, and UNIVERSITY OF ILLINOIS FOUNDATION, Defendant.	)	Appeal from the Circuit Court of Madison County. Nos. 09-CH-537 & 09-CH-673 Honorable Clarence W. Harrison II, Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Spomer and Justice Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court had jurisdiction and acted within its discretion by denying the motion to vacate or, in the alternative, for leave to file a counterclaim and litigate the request to construe the trust.

¶ 2 The trustee, the Bank of Edwardsville, filed a petition in the circuit court of Madison County, Illinois, regarding administration of the Marian L. Beyer Trust. Marian and the University of Illinois Foundation were named as defendants in the petition. The circuit court entered a series of orders regarding administration of the trust. Marian then filed a motion to vacate the orders or, in the alternative, for leave to file a counterclaim and litigate the

request to construe the trust. The circuit court denied the motion and an interlocutory appeal was filed by Marian. On appeal, Marian raises issues as to whether the circuit court erred by denying the motion. We affirm.

¶ 3 FACTS

¶ 4 Emma Beyer shuffled off her mortal coil on November 4, 2004, survived by her only child, Marian L. Beyer. In her will, Emma bequeathed to Marian the family homestead, described as 7.49 acres of residential real estate in St. Jacob, Illinois.

¶ 5 The will also placed a corpus of $500,000 into the Marian L. Beyer Trust. The Bank of Edwardsville became the trustee. The will called for the trustee to pay to Marian "such income and principal from the trust as the trustee from time to time believes desirable for the comfortable maintenance, medical care and welfare, considering her other income known to the trustee." Upon Marian's death, the trustee was to distribute the remaining assets to "my blood descendants then living, or if none, to the University of Illinois Foundation."

¶ 6 On June 4, 2009, the trustee filed a petition for inspections, appraisals, and court direction, naming Marian and the Foundation as defendants. The trustee alleged that Marian had requested funds for roof replacements and building improvements, but had not responded to requests for permission to inspect the property. The trustee requested the court to order an inspection and provide direction regarding the expenditure of trust funds. Marian, through counsel, entered her appearance and answered the petition, alleging that she had granted the trustee permission to inspect and appraise the property. The trustee then filed another petition for court direction alleging that the buildings on the property were so dilapidated that the costs of repair were unreasonable. Marian filed a counterclaim requesting repairs. Over the ensuing months the court entered orders to repair the roofs, install gutters, remove dead trees, clean up damage caused by racoons, and pay a portion of Marian's attorney fees. On March 24, 2011, the court also entered an order denying a petition by Marian for attorney

fees.

¶ 7 On July 1, 2011, counsel for Marian was granted permission to withdraw. On July 29, 2011, new counsel entered appearance for her.

¶ 8 On September 14, 2011, Marian filed a "Motion to Vacate All Prior Orders of Court As Void Ab Initio Or, In the Alternative For Leave to File Amended Counterclaim And To Litigate The Request To Construe The Marian L. Beyer Trust." Marian alleged that necessary parties were not named or served and that the court had lacked jurisdiction to enter the prior orders. Marian alleged that Edward Beard, Donald Beard, Paul Langenwalter, and Venida Ashburn were the surviving nephews and niece of Emma and, being Emma's descendants, were necessary parties. Marian also alleged that the University of Illinois Foundation was never served.

¶ 9 After a hearing, the court denied the motion in its entirety. Marian appealed.

¶ 10 ANALYSIS

¶ 11 Marian contends that the Foundation and Emma's relatives were indispensable parties. At the conclusion of her reply brief, Marian asserts that the expenditure of trust assets prejudiced these nonjoined individuals and exposed her to relitigation. Marian's assertions are unfounded.

¶ 12 Marian's appeal rests on an asserted jurisdictional defect. Marian contends that the nonjoined defendants were necessary parties and that the failure to join them deprived that court of subject matter jurisdiction. See *In re Estate of Barth*, 339 Ill. App. 3d 651, 663, 792 N.E.2d 315, 324 (2003). Marian asserts that this failure rendered the court's prior orders void and subject to attack at any time. See *National Bank of Albany Park in Chicago v. S.N.H., Inc.*, 32 Ill. App. 3d 110, 121, 336 N.E.2d 115, 124 (1975).

¶ 13 Regardless of how the Foundation and Emma's kin are categorized, their absence did not deprive the court of jurisdiction nor render the court's orders void. Illinois has long

recognized that the failure to join an indispensable party may subject a judgment to collateral attack by that party, but does not deprive a court of jurisdiction over a party properly before it. *Just Pants v. Bank of Ravenswood*, 136 Ill. App. 3d 543, 546, 483 N.E.2d 331, 334 (1985); *In re Vaught*, 103 Ill. App. 3d 802, 804, 431 N.E.2d 1231, 1233 (1981). Thus, the determination of whether a failure to join a party calls for a court to vacate prior orders involves considerations of equity and judicial economy. *In re Estate of Thorp*, 282 Ill. App. 3d 612, 618, 669 N.E.2d 359, 363 (1996).

¶ 14 In *Thorp*, the children of a predeceased will beneficiary were not named as parties in a will construction suit. *Thorp* acknowledged that these absent individuals were indispensable parties, but ruled that the order of the trial court should not be set aside. *Thorp* explained that the mistaken notion that joinder is a jurisdictional matter stemmed from cases where the issue was discussed in terms of due process for a party seeking to intervene. *Thorp*, 282 Ill. App. 3d at 618, 669 N.E.2d at 363.

¶ 15 *Thorp* explained that joinder was not necessary for jurisdiction of the probate matter before the circuit court. Joinder was a matter of discretion:

> "However, failure to join an indispensable party is not, contrary to what was said in some older authorities, a 'jurisdictional' defect: the court can decide the case before it as to defendants who have been made parties even if it cannot decide the rest of the case because the absentee has not been made a party. F. James & G. Hazard, Civil Procedure § 9.21, at 444 (2d ed. 1977) (hereinafter Civil Procedure). The decree can be made binding on those beneficiaries who were parties to the suit. *Oglesby v. Springfield Marine Bank*, 385 Ill. 414, 430, 52 N.E.2d 1000, 1007 (1944); *Petta v. Host*, 1 Ill. 2d 293, 301, 115 N.E.2d 881, 885 (1953) (an order of probate is binding on all parties notified of the proceeding, but is a nullity as to interested parties who were not notified).

> Courts have a choice to make whether the case can be usefully and fairly decided between the existing parties, or whether a decision under such circumstances would be a futile gesture or even the source of harm. Where the objection is not made until after judgment, the objection should be rejected unless prejudice clearly appears. *State Farm Mutual Automobile Insurance Co. v. Haskins*, 215 Ill. App. 3d 242, 245, 574 N.E.2d 1231, 1234 (1991); *Allied American Insurance Co. v. Ayala*, 247 Ill. App. 3d 538, 544, 616 N.E.2d 1349, 1355 (1993); see *Provident* [*Tradesmens Bank & Trust Co. v. Patterson*], 390 U.S. 102, 19 L. Ed. 2d 936, 88 S. Ct. 733 [(1968)]; Civil Procedure § 9.21, at 444." *Thorp*, 282 Ill. App. 3d at 618-19, 669 N.E.2d at 363-64.

¶ 16 Marian both criticizes and attempts to distinguish *Thorp*. Marian contends that *Thorp* conflicts with cases where failure to join a party deprived a court of subject matter jurisdiction. See, *e.g.*, *Barth*, 339 Ill. App. 3d at 663, 792 N.E.2d at 324; *National Bank of Albany Park in Chicago*, 32 Ill. App. 3d at 121, 336 N.E.2d at 124; *People ex rel. Carson v. Mateyka*, 57 Ill. App. 3d 991, 995, 373 N.E.2d 471, 474 (1978). *Thorp*, however, took care to note that it was addressing an instance where the objection was raised by a party active to the litigation, and not by an individual who had not been joined. As *Thorp* explained: "The heirs who were parties, including defendant, had their day in court and can no longer complain." *Thorp*, 282 Ill. App. 3d at 619, 669 N.E.2d at 364; see 97 C.J.S. *Wills* § 1818 (2012).

¶ 17 Marian contends that *Thorp* is distinguished because a final judgment had been rendered. This distinction is without substance. *Thorp* unequivocally established the principle that the failure to join a potential beneficiary does not deprive a circuit court of jurisdiction over a party active in the litigation. *Thorp* stated that an objection not raised until after final judgment should be viewed with disfavor, but this disfavor stems from the deleterious effects of the delay in objection and not from the procedural finality of a

judgment. This is a matter of judicial economy, not jurisdiction.

¶ 18 As *Thorp* makes clear, the circuit court had jurisdiction and acted within its authority. Marian's appeal rests on a claim that the circuit court exceeded its jurisdiction. As such, the thrust of her appeal has been resolved. Nonetheless, *Thorp* leaves open the possibility of error if a circuit court fails to act within its discretion. As explained by *Thorp*, the question is not one of jurisdiction, but of equity and judicial economy.

¶ 19 Equity and judicial economy demanded the denial of Marian's motion. Marian moved to vacate the prior orders of the court. Her alternative prayer for leave to file a counterclaim, contained in the same motion to vacate, could be seen as an attempt to open a procedural window for the same vacatur. As in *Thorp*, jurisprudence called for denial of the motion. In *Thorp*, judicial economy called for allowing the determinations of the circuit court to stand. At the heart of *Thorp* was the concern that the absent heirs may institute new litigation:

> "There may be some uncertainty with the court's order construing the will because of the possibility that Betty Ann and Alice will eventually bring their own action, but things would not be more certain if we set aside that order. If defendant had timely brought his objection to the attention of the court, judicial economy may have required that Betty Ann and Alice be made parties. Judicial economy would not be served at this late date by setting aside the order for failure to join a necessary party." *Thorp*, 282 Ill. App. 3d at 619, 669 N.E.2d at 364.

¶ 20 Indeed, *Thorp* was a weaker example of the imperative of judicial economy than the case at hand. Similar to *Thorp*, Marian states a concern of exposure to relitigation. Nonetheless, in contrast to the uncertainty surrounding the unjoined heirs in *Thorp*, the record in the case at hand reveals that neither the named relatives nor the Foundation have any ground to revisit the prior orders of the court. If the two sets of unjoined defendants are

considered separately, the record indicates that none of these individuals would be likely to join in future litigation and no inequity occurred from their absence in the prior proceedings.

¶ 21 Marian's assertions about any necessity of joining the nephews and niece are unconvincing. Marian asserts that the named relatives had a potential residual interest as "blood descendants," but fails to address precedent indicating that, when used in a will, the term "descendants" is limited to lineal heirs, directly descending from the body of the decedent. *Johnston v. Herrin*, 383 Ill. 598, 605, 50 N.E.2d 720, 723 (1943). Moreover, Marian contended in her answer to the original petition that the Foundation is the remainder beneficiary of the trust.

¶ 22 Likewise, the absence of the Foundation did not result in inequity, nor does judicial economy call for its addition. Marian contends that the Foundation was not properly served at the initiation of the litigation. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 339, 775 N.E.2d 987, 996 (2002). This court need not determine the validity of the affidavit of waiver of service filed by the Foundation, as jurisdiction is not at issue. The Foundation's awareness of the prior proceedings belies any claim that its absence in the proceedings was inequitable.

¶ 23 This brings us to the curious matter of the Foundation's entry of appearance before this court. After the notice of appeal, the Foundation filed an entry of appearance. Marian moved to strike the entry as untimely. Marion noted that she was seeking declaratory judgment against the Foundation in a separate suit. The matter of the Foundation's entry was taken with the case.

¶ 24 Marian's stance is cloaked in irony. Marian's appeal does not stem directly from her own substantial interest, but from a general assertion that the trustee has not acted with discretion. Marian attacks the trustee, claiming it failed to protect the interests of other potential beneficiaries by joining them in the underlying proceedings. The irony was aptly described by the trustee in its response to Marian's motion to strike:

"Marian Beyer's motives in seeking to strike the University of Illinois Foundation's Entry of Appearance are questionable. Marian Beyer has claimed that the University of Illinois Foundation is a necessary party to these proceedings and has insisted on the court's jurisdiction acknowledging the court's jurisdiction over it. With the University of Illinois Foundation entering its appearance and further acknowledging the court's jurisdiction over it, Marian Beyer got exactly what she wanted. It makes no sense that she would now want the University of Illinois Foundation's Entry of Appearance stricken."

¶ 25 Aside from any irony or questions regarding Marian's motives, the record calls for this court to affirm the circuit court. The circuit court had jurisdiction. The circuit court acted within its discretion in denying Marian's motion. Indeed, considerations of equity and judicial economy demanded the actions of the circuit court.

¶ 26 Accordingly, Marian's motion to strike the Foundation's entry of appearance is denied, and the order of the circuit court of Madison County denying the motion to vacate or, in the alternative, for leave to file a counterclaim and litigate the request to construe the trust is hereby affirmed.

¶ 27 Motion denied; judgment affirmed.